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No.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

LOIS BUTLER,

Petitioner,

vs.

PEABODY INSTITUTE OF THE CITY OF BALTIMORE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF MARYLAND

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QUESTIONS PRESENTED

1. On February 11, 1980, during oral argument before the Court of Special Appeals of Maryland, counsel for respondent-appellee made a damaging admission on an important point in the case. Petitioner-appellant requested a verbatim copy of the transcript, but the court denied this request, thus seriously jeopardizing further petition to the Maryland Court of Appeals, which was denied. In view of the fact that the United States Supreme Court releases copies of oral argument transcripts, is there a conflict between state and federal law such as to justify certiorari, and have petitioner's Fifth and Fourteenth Amendment rights to due process been denied?

2. The state court denied a jury trial in a libel case on the grounds that the complaint states no cause of action, even though the complaint alleges that the defamatory writing inten-

tionally and falsely inserted the phrase "dropped (from graduate school) on account of illness," and that the petitioner was damaged in her professional activities by reason of this insertion. Furthermore, a letter sent by an official of respondent describes the "illness" as a mental problem. Under these circumstances, has petitioner's Seventh Amendment right to jury trial been violated?

TABLE OF CONTENTS

	Page
Questions Presented	i
Opinions Below	1
Jurisdiction	2
Constitutional Provisions Involved	2
Statement of the Case	3
I. Historical Background	3
II. Court Proceedings Since February 2, 1977	9
Argument for Allowance of Writ	22
Conclusion	34

INDEX TO APPENDICES

	App. Page
Appendix A. Unreported Per Curiam Opinion, February 22, 1980	1
Appendix B. Order Denying Petition for Certiorari, June 2, 1980	10
Appendix C. Unreported Per Curiam Opinion, September 27, 1982	11

Page

Appendix D. Order Denying Petition for Certiorari, December 20, 1982 17

Appendix E. Second Amended Declaration, April 27, 1981 18

Appendix F. Appellant's Motion for Copy of Oral Argument 30

Appendix G. Clerk's Letter to Counsel Advising Appellant of Court's Denial of Transcript of Oral Argument 32

Appendix H. Maryland Rule 1092, Non-Citation of Unreported Opinions 34

TABLES OF AUTHORITIES CITED

Cases

Baltimore University of Baltimore City v. Colton (Md. 1904) 57 A.14 4

Church of Scientology of California v. Cazares (C.A. 9th Circuit 1981) 638 F.2d 1272, 1278 28

Page

Diplomat Electric, Inc. v. Westinghouse Electric Supply Co., 378 F.2d 377, 430 F.2d 38 29

Fitzgerald v. Penthouse Intern, Ltd. (C.A. Md. 1981) 639 F.2d 1076 . . . 24,27

Gertz v. Robert Welch, Inc. (1974) 418 U.S. 323, 94 S.Ct. 2997, 41 L.Ed. 2.d 789 23

Goldwater v. Ginzburg (C.A. N.Y. 1969) 414 F.2d 324, cert. denied 90 S.Ct. 701, rehearing denied 90 S.Ct. 1085 . . 29

Hindes v. United States (5th Circuit 1964) 326 F.2d. 150, cert. denied 84 S.Ct. 1168 27

Hogan v. New York Times Co., 211 F. Supp. 99, aff. 313 F.2d 354 29

Jacron Sales Co. v. Sindorf (Md. 1976) 350 A.2d 688 18,24,25,26,27

Page

Jenoff v. Hearst Corp. (C.A. Md. 1981)
644 F.2d 1004 25,26,27

Lambert v. State (Md. 1950) 75 A.2d 327 . . 33

Metromedia, Inc. v. Hillman (Md. 1979)
400 A.2d 1117 18,20,25,26

Neal v. Maryland (Md. 1974) 314
A.2d 710. 15

New York Times v. Sullivan (1964) 376
U.S. 254, 84 S.Ct. 710, 11 L.Ed.
2d 686 23

Olinger v. American Savings & Loan
Association, 409 F.2d 142 29

Owens v. Battenfield (C.C.A. Okla.) 33
F.2d 753, cert. denied 50 S.Ct. 88 . . 34

Constitutions

United States Constitution, Fifth Amend-
ment i,2,30,32

Page

United States Constitution, Seventh Amendment ii,3,19,23,28,32,33

United States Constitution, Fourteenth Amendment i,3,32,33

Rules

Maryland Rule 307 10

Maryland Rule 309 10

Maryland Rule 310 10

Maryland Rule 1092 14,15,26

United States Supreme Court Rules, Rule 17, 28 U.S.C.A. 22,27,30

Statutes

United States Code, Title 28, Sec. 2101 (c) 2

Treatises

Corpus Juris Secundum, vol. 16A, page 553 33

Restatement (Second) of Torts (Tent. Draft No. 21, 1975) 25

IN THE
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October Term, 1983

No.

LOIS BUTLER,

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vs.

PEABODY INSTITUTE OF THE
CITY OF BALTIMORE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF MARYLAND

Petitioner Lois Butler respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the Maryland Court of Appeals entered in this proceeding on December 20, 1982.

OPINIONS BELOW

The proceedings below involve two separate opinions of the Maryland Court of Special Appeals and two affirmances without opinion by the Maryland Court of Appeals. The Court of Special Appeals opinion of February 22, 1980, is repro-

duced as Appendix "A"; the Court of Appeals affirmance is reproduced as Appendix "B"; the Court of Special Appeals opinion of September 27, 1982, is reproduced as Appendix "C"; and the final Court of Appeals affirmance is reproduced as Appendix "D."

JURISDICTION

The judgment of the Maryland Court of Appeals was entered on December 20, 1982. This represents the final order by Maryland's highest court, and this Petition for Certiorari was filed within ninety (90) days of that date, as required by 28 U.S.C.A. 2101(c).

CONSTITUTIONAL PROVISIONS INVOLVED

1. United States Constitution:

Fifth Amendment (in relevant part):

> "No person shall be . . . deprived of life, liberty, or property, without due process of law. . . ."

Seventh Amendment (in relevant part):

> "In suits at common law, where the value of the controversy shall exceed twenty dollars, the right of trial by jury shall be preserved . . ."

Fourteenth Amendment (in relevant part):

> ". . . nor shall any state deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law."

STATEMENT OF THE CASE

Because this controversy originated in 1941, it is necessary to briefly review the historical background before describing the present posture of the case.

I. HISTORICAL BACKGROUND

In 1939 Petitioner Lois Butler, then a talented professional musician in her twenties, the

holder of a Bachelor of Music degree from Southwestern University in the State of Texas, applied for admission to the master's degree program at the Peabody Institute of the City of Baltimore (Respondent). She was enrolled in the master's program and attended Peabody on a full-time basis during the academic years 1939-40 and 1940-41. During this period she amassed a total of 64 credit hours, far in excess of the credit hours required for the master's degree, but no degree was conferred on petitioner by Respondent institution. Moreover, when Ms. Butler attempted to re-enroll in the fall of 1941, she was refused permission to do so and in effect was expelled without explanation or a hearing, in plain violation of the mandate of Baltimore University of Baltimore City v. Colton, 57 A.14, decided on February 19, 1904, by Maryland's highest court.

Rebuffed by Peabody, Ms. Butler moved to Boston, where she worked as a church organist and, in 1947, attempted to enroll in the master's

program of the Boston University College of Music. As part of the application procedure, Ms. Butler was obliged to request Peabody to furnish a transcript of her grades to Boston University. Respondent duly sent a transcript, which included the following phrase on the bottom of the page: "dropped on account of illness." This was the first time Peabody had furnished a concrete reason for Ms. Butler's expulsion in the fall of 1941, some six years previously.

Mr. Kenneth Kelley, Dean of the Boston University of Music, wrote Dean Carty requesting an explanation of the phrase "dropped on account of illness," and received this letter in reply, dated May 24, 1947:

"Mr. Kenneth G. Kelley, Dean
Boston University
College of Music
25 Blagden St.
Boston 16, Mass.

May 24, 1947

Dear Mr. Kelley:

I have your letter of May 23 and I will do my best to be fair to all parties concerned. Miss Lois Butler has a great deal of talent and ability.

Unfortunately, however, she is extremely nervous and loses control of herself to such an extent that she herself has sought medical advice. During her period of study with us it seemed impossible for her to concentrate on the work at hand, which she was capable of doing and doing well. She was continually asking for changes in her course and seemed to be so convinced that her difficulties were because of outside interference rather than within herself that we finally felt we could not permit her to reenroll. We tried in every way to help her but were advised by the doctors to whom she went that the nature of her illness would prevent her from giving her full attention to the courses she wished to undertake.

Miss Butler is capable of holding professional positions, and has done this during her residence in Baltimore, and it is a great misfortune that she could not control herself. It may be that in a new environment her condition will improve, and I must repeat that she has both talent and ability.

I want very much to be fair to Miss Butler, but on the other hand, I must be honest with you.

Sincerely yours,

(Sgd.) Virginia Carty, Dean"

As a result of this letter, Boston University College of Music rejected Ms. Butler's application for enrollment.

The allegations in Dean Carty's letter were false. The sentence, "Unfortunately, however,

she is extremely nervous and loses control of herself to such an extent that she herself has sought medical advice" is untrue in two respects. Ms. Butler was not "extremely nervous" and did not lose "control of herself," as evidenced by the fact that throughout her two years at Peabody, she occupied a chair in the first violin section of the Baltimore Symphony Orchestra, in addition to serving as organist at various churches in the Baltimore area. The second respect in which the above-quoted sentence is false is that Ms. Butler never sought "medical advice" because she was "extremely nervous and loses control of herself." Also, the sentence, "she was continually asking for changes in her course . . ." is demonstrably false because Ms. Butler, as noted in Dean Carty's letter of June 13, 1941, passed a total of 25 graduate courses. Even in the summer of 1941, she successfully completed a German course at Johns Hopkins University, fulfilling one of the academic requirements of Peabody. Her tran-

script indicates that her grades were good, most of them above average. The sentence in the May 24, 1947, letter stating "we tried in every way to help but were advised by the doctors to whom she went that the nature of her illness would prevent her from giving her full time and attention to the courses she wishes to undertake" was the cruelest blow of all, for Ms. Butler had never consulted any doctors while enrolled at Peabody.

Between 1951 and 1975, Ms. Butler corresponded with Peabody while working as a music teacher in the District of Columbia public schools system. Because Peabody had unjustifiably refused to award her a master's degree in 1941 and had blacklisted her at Boston University in 1947, she was paid on a lower salary scale than had she possessed a master's degree. It is estimated that her direct out-of-pocket losses attributable to Peabody's actions was approximately $55,000.

In 1976, Ms. Butler requested Peabody to forward a transcript of her grades to the

Personnel Division, Washington, D.C. Public Schools. The D.C. Public Schools had requested this material in connection with evaluating her salary and tenure. On February 2, 1976, Peabody, through an agent, mailed a grade transcript to the D.C. Public Schools, which was received on February 3, 1976. This transcript contained the untrue phrase "dropped on account of illness." As a result of this transcript, Ms. Butler was forced to retire prematurely from her teaching position. On February 2, 1977, Ms. Butler brought suit for libel against Peabody in the Circuit Court of Montgomery County, Maryland. This suit is the subject of this petition.

II.

COURT PROCEEDINGS SINCE FEBRUARY 2, 1977

Throughout six years of litigation, the case has never been tried to a jury or to the court. The appeals of 1979-80 sprang from the trial court's denial of Ms. Butler's motion for a default judgment, which was based on the fact that

Peabody's answer to the initial complaint was filed eight months late.[1] The appeals of 1982 were caused by the trial court's granting of Peabody's demurrer to the second amended declaration (Appendix "E"). Both sets of appeals were decided adversely to Ms. Butler, and review of both appeals is sought in this court.

The federal constitutional questions arose out of the state litigation, and involve fundamental questions of fairness, due process, and right to jury trial.

In the earlier appeal (1980), which was occasioned by the denial of Ms. Butler's motion for default judgment, the federal question arose in the following manner. On the trial court level and on appeal, Peabody defended against the default motion by claiming its counsel was so "confused" that it did not know what papers to

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[1]Maryland Rules 307, 309, and 310 specify answers to declarations should be filed within fifteen days unless time is enlarged.

file. This extraordinary argument, advanced by experienced attorneys from one of Baltimore's premier law firms, was persuasive to Superior Court Judge Shirley Jones. At oral argument before a panel of the Court of Special Appeals on February 11, 1980, one of the judges, evidently unimpressed by the argument of confusion, inquired of Peabody counsel words to the effect, "What was the real reason why you did not respond to the declaration for eight months?" To which Peabody counsel replied in effect, "The papers sat on the desk of the insurance adjuster for eight months and as soon as they were forwarded to me I acted in the case."

The above quotations, taken from handwritten notes, are approximate, but they convey the general sense of the exchange. This admission by Peabody counsel of course fatally undermines the argument of confusion and puts an entirely different complexion on the situation. If Peabody's insurer held the court papers for

eight months without referring them to its counsel, there was no confusion--there was simple negligence--and the default should have been granted. But the Court of Special Appeals panel chose to ignore Peabody counsel's admission of negligence and issued an unreported opinion (Appendix "A"), which quoted Shakespeare and enthusiastically endorsed Peabody's theory of confusion while affirming the lower court ruling.

Among the numerous errors in the Court of Special Appeals' opinion of February 22, 1980 (Appendix "A"), are statements that Ms. Butler did not furnish certain items in the record abstract, when in fact those items were furnished in an amended appendix filed with court permission. Another error in the opinion is the statement that the docket indicates that the case was dismissed in Montgomery County; whereas, the docket plainly indicates that only the non-legal entity "Peabody Conservatory," was discharged,

leaving "Peabody Institute" as the defendant in the case transferred to Baltimore City.

Ms. Butler, through counsel, thereupon filed a motion with the Court of Special Appeals requesting a verbatim transcript of the oral argument, which was tape recorded by a clerk of the court (Appendix "F"). The court denied this motion without explanation (Appendix "G"). This denial damaged Ms. Butler's attempt to have the intermediate panel's decision reversed by the Court of Appeals, Maryland's court of last resort. A petition for certiorari was filed with the Court of Appeals, but that Court affirmed the intermediate panel without opinion. Because Ms. Butler did not have a transcript of the argument before the intermediate panel, there was no way she could prove the admission of Peabody's counsel in her papers filed with the state court of last resort.

We see here a situation in which, on the intermediate appellate level in the State of

Maryland, a cycle of secrecy has been established. The Court of Special Appeal's opinion was unreported, meaning it cannot be cited as precedent in other cases (Md. Rule 1092; see Appendix "H"). This is tantamount to saying that the intermediate panel may make wrong decisions and produce illegal opinions with impunity, since those decisions and opinions never find their way into the published reports and can never be cited as precedents. According to traditional legal theory, appellate courts are restrained from erratic and prejudiced decisions by the necessity of keeping rulings within the bounds of the law because an erratic opinion will establish a bizarre precedent that must be followed in other similar cases. But if, as in the instant case, the opinion is unreported by order of the court, this restraint is removed. The argument that erratic opinions can be corrected by higher court review is negated by the heavy expenses to litigants when they are forced to

pursue cases through various appellate layers. Formerly, when opinions were published by private reporters, a court usually could not dictate which opinions were to be "reported" and which were to be "unreported." A court such as the Maryland Court of Special Appeals issues many more "unreported" than "reported" rulings, and Maryland Rule 1092 prevents private reporters from publishing the "unreported" decisions.[2]

But unfortunate as the "unreported" system is, the practice of refusing to issue verbatim

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[2]Neal v. Maryland, 314 A.2d 710, Md. Ct. of Special Appeals, decided February 11, 1974, states in fn. 9: "Approximately one-quarter of the opinions of the Court of Special Appeals are reported. Claims of violation of the right to a speedy trial or the guarantee against double jeopardy have been presented to us in cases many more times than is reflected in the reported opinions and have been disposed of in unreported per curiam opinions as not of 'substantial interest as a precedent,' pursuant to the mandate of Rule 1092b. In all likelihood, had we found in any of those cases that the right to a speedy trial had been denied or the guarantee against being twice put in jeopardy had been violated, the opinion would have been published."

transcripts of oral argument before appellate panels is equally, if not more, nefarious. The oral argument is open to the public; it is not part of the deliberative process. There is no reason why an appellate panel should not provide transcripts of oral argument to litigants, upon payment of proper fees. The United States Supreme Court, the highest court in the land, furnishes transcripts of oral argument upon request. It is odd that the secrecy needs of an intermediate panel in the State of Maryland should be greater than those of the U.S. Supreme Court. What reasonable purpose is served by the Maryland Court of Special Appeals' refusal to release verbatim transcripts? Certainly the argument that the "administration of justice" requires concealment of transcripts rings hollow. If justice can be administered by the U.S. Supreme Court, even though transcripts are made public, one would think that the intermediate Maryland panel would have no problem in this regard. However, if the

concealment of transcripts is considered against a background of "unreported," and therefore concealed, decisions, there exists the definite possibility that both rules are related to an underlying policy of appellate secrecy.

Considering the second set of appeals (1982), which resulted from the trial court's granting Peabody's demurrer on numerous grounds, there is an opinion by the Court of Special Appeals and an affirmance without opinion by the Court of Appeals. The rationale for affirmance of the trial court's order, therefore, must be found in the opinion of the intermediate panel.

It should be noted, furthermore, that the issue of the denial of the oral argument transcript in the 1980 appeal was again raised by Ms. Butler in the 1982 appeal. But neither the intermediate court nor the court of last resort addressed this issue in the 1982 appeal. Since there was, similarly, no reason given in 1980 for the refusal

to issue the transcript, the rationale for non-issuance has never been set forth by the Maryland appellate courts.

On the question of the demurrer, the intermediate panel stated that the Second Amended Declaration was fatally defective in that it did not allege sufficient detail concerning the "innuendo" to conform to the requirements of Jacron Sales Co. v. Sindorf, (Md. 1976), 350 A.2d 688, and Metromedia, Inc. v. Hillman, (Md. 1979) 400 A.2d 1117. Under Maryland law as elucidated by these two landmark cases, a declaration alleging libel per se (a statement that is on its face libelous) does not need to be supported by an "innuendo"; whereas, if libel per quod (a state not on its face defamatory) is alleged, the circumstances making the statement defamatory must be set forth in detail. The court held that the phrase "dropped on account of illness" is not defamatory per se even if false, and that insufficient supporting

detail was alleged in the Second Amended Declaration.

This decision is clearly erroneous and in effect deprives Ms. Butler of her Seventh Amendment right to a jury trial, for when the demurrer was sustained in advance of trial, the case was thrown out. In briefs filed in the intermediate court and in the Court of Appeals, Ms. Butler alleged that her Seventh Amendment rights were being violated.

The reason that this decision is erroneous is that throughout the course of this litigation, the full story of the blacklisting has been repeated over and over again in pleadings, letters, and oral argument by Ms. Butler's counsel. The Second Amended Declaration, to which the demurrer was sustained, was not filed until 1981, after the case had been in litigation for four years. It is true that the phrase "dropped on account of illness" does not specifically allege "mental illness," yet Peabody Dean Carty's letter of May

24, 1947, clearly indicates that Peabody is falsely claiming that Ms. Butler was dropped on account of mental illness. This letter, of course, was written by an official of Respondent Peabody, and it was quoted in a brief submitted to Peabody in 1975, as well as in papers filed during the course of the litigation. Furthermore, when Peabody's demurrer was filed in response to the Second Amended Declaration, the letter of May 24, 1947, was again quoted in Ms. Butler's response to the demurrer. Metromedia v. Hillman states that in Maryland, libel pleading is basically notice pleading.[3] It is ridiculous to say that Peabody was not fully on notice of the exact nature of the libel alleged by Ms. Butler, because ever since 1947 this matter has been the subject of extensive correspondence between Ms. Butler and Peabody,

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[3]Metromedia states, "we see the question here as being not so much a distinction between libel per se and libel per quod as a question of what is necessary to put a defendant on notice, what will satisfy our pleading requirements . . ."

and ever since 1975, the case has been in active litigation. It is ironic that despite great efforts of Ms. Butler and her counsel to prove in court that Peabody has libeled Ms. Butler with a false charge of mental illness, the Maryland courts should rule that there was insufficient detail concerning the circumstances of the libel in one pleading--the Second Amended Declaration filed in 1981--and therefore the case should be thrown out.

Furthermore, under the well-known circumstance of modern life, when employers are very sensitive to workmen's compensation and disability claims by employees, a false allegation of illness amounts to libel per se. When the case was dismissed as not stating a cause of action, this meant that even if the allegations were true, there would still be no ground for recovery. The Maryland courts are saying, in effect, that even if the phrase "dropped on account of illness" was false, still Ms. Butler has no cause of action.

This is a truly perplexing ruling in a day when prospective employers often require prospective employees to take physical examinations and routinely refuse to hire people who are not in good health. For a school to make a false allegation of illness, mental or physical, on a grade transcript is a most serious thing, and that school ought to be made to respond in damages.

ARGUMENT FOR ALLOWANCE OF THE WRIT

U.S. Supreme Court Rule 17, 28 U.S.C.A., states in part that a review on certiorari will be granted when:

"(b) When a state court of last resort has decided a federal question in a way in conflict with the decision of . . . a federal court of appeals . . .

"(c) When a state court . . . has decided an important question of federal law which has not been, but should be, settled by this court . . ."

Both (b) and (c) apply in this matter.

As pointed out in the statement of the case, this matter has never been tried before a jury, in fact no evidentiary testimony of any sort has been taken in the six years it has been in litigation. There has been, therefore, a factual denial of jury trial, which has been justified by the courts below on the grounds that there is no cause of action.

The federal issue revolves around the question of whether this denial rises to violation of petitioner's right to jury trial under the Seventh Amendment.

New York Times v. Sullivan, (1964) 376 U.S. 254, and Gertz v. Robert Welch, Inc. (1974) 418 U.S. 323 established the rule that public figures must show "actual malice" in order to recover damages for defamation. If a plaintiff is not a public figure, these cases hold that state law governs defamation actions. New York Times and Gertz do not apply to the instant case, in

which respondent has never alleged that petitioner is a public figure or that a public question is involved. Maryland law as enunciated in Jacron Sales Co. v. Sindorf, (Md. 1976) 350 A.2d 688, therefore applies.

Jacron states (350 A.2d 698) ". . . we hold that proof of fault in cases of purely private defamation must meet the standard of the preponderance of the evidence. This is the quantum of proof ordinarily required in other types of actions for negligence, and is apt to be more readily understood by juries . . . (350 A.2d 700) . . . while the question of whether a defamatory communication enjoys a conditional privilege is one of law for the court, whether it has been forfeited by malice is usually a question for the jury."

Fitzgerald v. Penthouse Intern, Ltd. (C.A. Md. 1981) 639 F.2d 1076 ruled that if a plaintiff in a libel action is a private person, the negligence standard, rather than the actual malice

standard, applies. Jenoff v. Hearst Corporation, (C.A. Md. 1981), 644 F.2d 1004, also applying Maryland law, ruled that the negligence standard applied and granted recovery, citing Jacron and the Restatement (Second) of Torts para. 580B.

Jenoff quotes Restatement (Second) of Torts (Tent. Draft No. 21, 1975):

> 580B. Defamation of Private Person
>
> One who publishes a false and defamatory communication concerning a private person or concerning a public official or public figure in relation to a purely private matter not affecting his conduct, fitness or role in his public capacity, is subject to liability, if, but only if, he
>
> (a) Knows that the statement is false and that it defames the other,
>
> (b) Acts in reckless disregard of these matters, or
>
> (c) Acts negligently in failing to ascertain them.

It is evident, both from Jacron, a Maryland Court of Appeals case, and Jenoff, a Federal 4th Circuit decision applying Maryland law, that in Maryland a private defamation case may be tried on negligence principles. Furthermore, Metromedia v. Hillman (see footnote 3, p. 20), another

leading Maryland case, ruled that defamation pleading is essentially notice pleading. Accordingly, in the instant case, when Maryland courts rule that the phrase "dropped on account of illness" is not defamatory as a matter of law, and that insufficient "innuendo" has been alleged, the court is contradicting the main body of Maryland law, which contradiction is possible because the only written opinion--that of the Court of Special Appeals--is unreported and cannot be cited as precedent (Md. Rule 1092). We see here how a maverick decision that runs contrary to the established case law can be obfuscated because of the mechanism of Rule 1092. Under Jacron, Jenoff, and Metromedia, petitioner, a private party, should have been given a chance to prove, at the very minimum, that the phrase "dropped on account of illness" was negligently placed on the transcript of her college grades.

The allegations of the Second Amended Declaration encompass negligence as well as actual

malice (see Appendix "E"). The situation, therefore, is that Maryland courts, in refusing to let this case go to trial, or even in not scheduling any testimonial hearing at all to inquire into the basis of the allegations of malice and negligence, contradicted Jacron, a Maryland Court of Appeals decision, and two 4th Circuit holdings--Jenoff and Fitzgerald. Under Supreme Court Rule 17(b), this Court should grant certiorari, for there is a federal question--the right to jury trial--and the state court of last resort has ruled contrary to holdings of the 4th Circuit Court of Appeals.

A summary judgment ordinarily should be granted only if there are no genuine issues of fact. See Hindes v. United States (5th Circuit 1964), 326 F.2d 150, cert. denied 84 S.Ct. 1168. In the instant case, the facts as alleged by the Second Amended Declaration have not been denied by respondent, who instead elected to proceed by the technical device of demurrer. However, respondent made substantive denials in its earlier

answer to the first amended declarations, which alleged the same factual situation as the Second Amended Declaration. There are, therefore, genuine issues of fact in the case. Church of Scientology of California v. Cazares, (C.A. 9th Circuit 1981) 638 F.2d 1272, 1278, held that "any doubt as to the defamatory effect of publication should be resolved by a jury, not by even the most carefully considered judicial pronouncement."

When three levels of the Maryland judicial system upheld respondent's demurrer in a private-figure/private-matter defamation case in which both negligence and actual malice was alleged, and in which there was a factual dispute concerning substantive issues, petitioner's rights under the Seventh Amendment have been violated.

Moreover, Ms. Butler alleged in the Second Amended Declaration that she was injured in her professional capacity by Peabody's statement, "dropped on account of illness." A jury was never permitted to decide this point, even though

the law is clear that statements tending to injure a person's trade or profession are actionable. Olinger v. American Savings & Loan Association, 409 F.2d 142; Hogan v. New York Times Co., 211 F. Supp. 99, affirmed 313 F.2d 354; Diplomat Electric, Inc. v. Westinghouse Electric Supply Co., 378 F.2d 377, 430 F.2d 38.

A false accusation of mental imbalance or mental disease is libel per se. Goldwater v. Ginzburg, 414 F.2d 324, (C.A. N.Y. 1969), cert. denied 90 S.Ct. 701, 396 U.S. 1049, 24 L.Ed. 2d 695, rehearing denied 90 S.Ct. 1085, 397 U.S. 978, 25 L.Ed. 2d 274.

These cases provide additional reasons why certiorari should be granted in the instant case. The Second Amended Declaration and supporting material claim petitioner was injured in her profession, and that the defamatory words imputed mental illness, and both claims have been denied by respondent. Yet no testimony was taken by the state courts on either issue.

To exacerbate matters, the Fifth Amendment due process question has arisen in these proceedings because of the intermediate state court's refusal to permit release of an appellate transcript. This invokes Rule 17 (c), 28 U.S.C.A., which states ". . . when a state court has decided an important question of federal law which has not been, but should be, settled by this court, or has decided a federal question in a way in conflict with applicable decision of this court . . ."

The availability of transcripts of oral argument before appeals courts is obviously an important matter, otherwise the arguments themselves must be considered unimportant. Assuming that oral presentations before reviewing panels and the questions of judges are important, it is equally necessary that verbatim transcripts be made available to counsel upon payment of reasonable fees. The Maryland Court of Special Appeals has no rule concerning appellate transcripts, but

as a matter of practice, requests for transcripts are denied. In the United States Supreme Court, however, transcripts are made available. The question, therefore, boils down to this: does the U.S. Supreme Court rule concerning availability of transcripts reach the status of an "important question of federal law" which would justify review on certiorari? The answer must be in the affirmative, since transcripts of appellate arguments must otherwise be considered unimportant. Although this is a procedural matter, procedure often affects litigants substantive rights, as occurred in the underlying case. In many states, such as Maryland, there is a two-tier appellate system, with two levels of reviewing courts above the trial court. The oral argument in the lower tier is part of the case that is appealed or petitioned to the higher tier. The U.S. Supreme Court becomes a third tier above the trial court, in a few of these cases. The orderly administration of justice requires that there be a federal

rule concerning the availability of oral argument transcripts throughout these various appellate levels. It is not logical that the lower tiers should withhold transcripts while the highest tier makes them available.

The federal questions have been raised in trial and appellate courts below, but no rulings have been obtained. In appellant's brief in the Court of Special Appeals, September Term 1982, No. 54, on page 15 the statement is made, "A federal question under the due process clause of the United States Constitution may be involved if substantial rights of the litigants are lost or affected because of the lack of a true verbatim copy (of the transcript)."

Appellant's petition in the Court of Appeals, September term 1982, page 7 states as follows: "The denial of petitioner's right to a jury trial has reached the proportions of a federal constitutional issue (citing Article VII) . . . It has been often stated that the Fourteenth Amendment to

the United States Constitution enforces the first eight amendments--the so-called 'Bill of Rights'--against the states. Lambert v. State, (Md. 1950), 196 Md. 57, 75 A.2d 327. The right to jury trial, as embodied in the Seventh Amendment quoted above, therefore comes under federal constitutional protection. Accordingly, when 'fundamental fairness' is violated by judicial procedures which operate to deprive a litigant of a jury trial, a federal constitutional question is presented, as in this case. The equal protection and due process clauses of the Fourteenth Amendment '. . . is (are) not to be read with literal exactness, and has (have) been required to be liberally construed in order to effectuate its purpose; but the courts cannot go very far against the literal meaning and plain intent of the constitutional test.' (16A Corpus Juris Secundum, p. 553.) Moreover, 'The Judicial Act of the highest court of the State, in authoritatively construing and enforcing its laws, is the Act of

the State.' Owens v. Battenfield (C.C.A. Okla.), 33 F.2d 753, cert. denied 50 S.Ct. 88."

When state courts are squarely confronted with constitutional issues and unjustifiably refuse to rule, this should not deprive the Supreme Court of certiorari jurisdiction; otherwise, important constitutional rights will be unprotected by the highest court in the land.

CONCLUSION

For the reasons stated above, it is respectfully requested that this court issue a writ of certiorari to the Maryland Court of Appeals or, if appropriate, to the Maryland Court of Special Appeals, and for such other relief as is in the interest of justice.

Respectfully submitted,

JOHN Z. NOYES

BEVERLY G. STONE

Attorneys for Petitioner,

Lois Butler

APPENDIX A

UNREPORTED PER CURIAM OPINION,

FEBRUARY 22, 1980

In the Court of Special Appeals of Maryland.

No. 792, September term, 1979.

Lois Butler v. Peabody Institute of the City of Baltimore.

Before: Gilbert, C.J.; Thompson, Liss, JJ.

Filed: February 22, 1980.

Lois Butler, appellant, has seemingly resurrected a claim against the Peabody Institute of the City of Baltimore. Ms. Butler's grievance stems from her attendance at the Peabody as a student from 1939 to 1941. For reasons not apparent from the record, she was denied readmission in the fall of 1941. According to Ms. Butler, she was "in effect expelled, even though her grades throughout her two years of attendance had been above average and she had not failed any courses, nor was she ill." Subsequently, Ms. Butler "sought to enroll in Boston

University." The transcript from Peabody "issued in 1947" bears the notation, "dropped on account of illness." It is those five words that are the bone of contention between the litigants. Ms. Butler, in 1951, sued Peabody in what she says was an action "to force Peabody to correct its records." The Circuit Court No. 2 of Baltimore City, so Ms. Butler states, "held that it was without power to order Peabody to correct its records, absent a showing of malice. Thereupon, the suit was dismissed and no appeal taken therefrom."[1]

Things seem to have drifted thereafter in the status quo until 1975 when Ms. Butler sought to air her grievance judicially and thus raised

---

[1]Why that decision does not render this matter res judicata is not addressed by the parties, nor does it seem to have been raised in the hearing court. We express no opinion upon the merits of such a claim.

"Phoenix from the ashes."[2] A suit was filed in the District of Columbia in September 1976. That court, on motion, dismissed the case. Ms. Butler appealed to the District of Columbia Court of Appeals. While the appeal was pending, she sued Peabody and Johns Hopkins University in the Circuit Court for Montgomery County.[3] Peabody filed a motion raising preliminary objection. Md. Rule 323. The motion was granted. The docket entries show:

> "4-27-77. Hearing on Defendant, Peabody Institute of the City of Baltimore's motion raising preliminary objection, sustained. . . .
>
> 4-27-77. Hearing on Defendant, Johns Hopkins University demurrer, sustained within fifteen (15) days to amend.
>
> 4-27-77. Defendant, Peabody Institute of the City of Baltimore's oral motion for leave to amend caption by striking defendant, The Peabody Conservatory of Music, granted. Clerk to strike.

---

[2]See Shakespheare (sic), Henry VIII, Art. V, Scene v, l. 40.

[3]The forum appears to have been selected because of its convenience to Ms. Butler.

4-27-77. Plaintiff's oral motion to transfer case to Baltimore City as to Peabody Institute of the City of Baltimore only granted."

If the docket entries are correct, and we presume that they are, when the circuit court granted the appellee's motion raising preliminary objection and motion deleting Peabody from the caption, the appellee was out of the case. There was nothing to transfer insofar as the appellee is concerned. In any event, the record is clear to this point as to the happenings in this case. From here it is fraught with bewilderment. Indeed, if after having read the briefs and the record, one is not confused, then he simply does not understand the problem.

We glean from the record that the case seems to have made its way to the Superior Court of Baltimore City where it ultimately was heard on motion by Judge Shirley B. Jones, then of the Supreme Bench of Baltimore City, but now a Judge of the United States District Court for the

District of Maryland. The motion, if granted, would have resulted in a default judgment against Peabody for want of a plea. Judge Jones declined to enter a default judgment against Peabody. Furthermore, she refused to issue the injunction sought in the original declaration. The injunction prayed would have prevented "future irreparable harm." Judge Jones, in refusing to grant the default judgement noted that "the record . . . is in . . . [an] incomplete and confusing posture." That comment might be a classic understatement.

Ms. Butler then appealed to this Court. A motion to dismiss the appeal was denied because Md. Courts and Judicial Proceedings (1974) Code Ann. § 12-303(c)(3) permits an appeal from a refusal "to grant an injunction." Although we were compelled by section 12-303(c)(3) to deny the dismissal, we directed that the appeal be limited to a review of the hearing judge's declination to grant an injunction. Insofar as the

appellant is concerned, the order of limitation seemingly fell on deaf ears. While paying lip service to the order, Ms. Butler focuses much of her argument on the hearing court's refusal to enter a default judgment against Peabody for want of a plea.

To illustrate that appellant ignores an order of limitation of issue, we need but read the relief requested by appellant in this Court. Appellant asks that we rule:

> "1. [T]hat the trial court abused its discretion by denying the default, and the injunctive relief requested in the original declaration;
>
> 2. That appellee must award appellant a master of music degree retroactive to 1941;
>
> 3. That the words 'dropped on account of illness' must be omitted from appellant's transcript when same is issued by appellee;
>
> 4. That appellee will issue true and correct transcripts, including the aforementioned points 1, 2, and 3, whenever requested to do so by appellant;
>
> 5. That the case will be remanded to the trial court for further proceedings to determine the amount of damages owed by

appellee to appellant under the rule of Sullivan v. Miller;

6. That this Court will retain jurisdiction and order that the case be assigned to a judge other than Judge Jones on remand;

7. For such other relief as is in the interest of justice."

It is patent that notwithstanding that the only issue properly before us is the refusal by Judge Jones to issue the injunction, Ms. Butler seeks to argue just about everything else. The issue presented by appellant should have been whether the hearing judge abused her discretion in denying the injunction. We shall not answer that issue, however, because we are of the view that the appeal must be dismissed.

Maryland Rule 1028 b 1 provides that the record extract "shall contain such parts of the record as may reasonably be necessary for the determination of the questions presented by the appeal, and shall include:

(a) The judgment appealed from, together with the opinion or charge of the lower court, if any.

(b) So much of the . . . pleadings or other matter contained in the record to sustain any action, ruling, order or judgment of the lower court."

Our review of the extract reveals:

1. The order of the Superior Court denying the judgment by default is not part of that extract, a violation of Md. Rule 1028 b 1 (a).

2. The "Memorandum Opinion" of Judge Jones is not included in the extract, a violation of Md. Rule 1028 b 1 (a).

3. The original declaration is not included in the extract, a violation of Md. Rule 1028 b 1 (b).

4. The motion for judgment by default is not part of the record extract, a violation of Md. Rule 1028 b 1 (b).

Rule 1028 i 2 provides that we may dismiss an appeal for violation of Md. Rule 1028 b 1 (b). Because of the several violations of Md. Rule 1028 b 1 (b), and the failure of appellant to heed this Court's order limiting the issue on appeal, we, pursuant to the rule, sua sponte, dismiss the appeal.

For whatever solace appellant may derive, we have reviewed the record in toto and would, if properly confronted by the issue, agree with Judge Jones.

APPEAL DISMISSED.

COSTS TO BE PAID BY APPELLANT.

APPENDIX B

ORDER DENYING PETITION FOR CERTIORARI, JUNE 2, 1980

In the Court of Appeals of Maryland.

Petition Docket No. 76, September Term 1980.

Lois Butler v. Peabody Institute of the City of Baltimore.

Before: Robert C. Murphy, C.J.

Filed: June 2, 1980.

Upon consideration of the petition for a writ of certiorari to the Court of Special Appeals in the above entitled case, it is

ORDERED, by the Court of Appeals of Maryland, that the petition be, and it is hereby, denied as there has been no showing that review by certiorari is desirable and in the public interest.

/s/ Robert C. Murphy

Chief Judge

Date: June 2, 1980.

APPENDIX C

UNREPORTED PER CURIAM OPINION,

SEPTEMBER 27, 1982

In the Court of Special Appeals of Maryland.

No. 54, September Term, 1982.

Lois Butler v. Peabody Institute of the City of Baltimore.

Before: Morton, Lowe, Bishop, JJ.

Filed: September 27, 1982.

Lois Butler appeals from a Superior Court of Baltimore City ruling sustaining without leave to amend appellee's demurrer to appellant's Second Amended Declaration. The second amended declaration alleged that a transcript of appellant's grades which was mailed, at her request to her employer, was libelous.

Issues

Two issues are raised:

1. Whether the trial court properly sustained appellee's demurrer to the Second Amended Declaration without leave to amend.

2. Whether the court erred when it denied appellant's motion for a transcript of a previous oral argument.

The Facts

In her second amended declaration the appellant alleged that on December 22, 1975, she requested the appellee to send a transcript of her grades to her employer, the District of Columbia Public Schools, and that on or about February 3, 1976, the appellee complied with this request. The appellant alleged that on the transcript the appellee used the phrase, "Dropped on account of illness", and that this was "false, misleading, and defamatory." In her amended declaration the appellant denied that she had been discharged because of illness and averred that the appellee really meant "mental illness" in its use of the word "illness." The appellant goes on to contend that whether the District of Columbia Public Schools interpreted the phrase as physical or mental illness, it was nonetheless defamatory:

> "because Plaintiff is and has been for over forty years a professional musician, and the phrase in Defendant's paper writing meant that Defendant falsely certified that 'illness' prevented Plaintiff from finishing her course of musical studies at Peabody. The plain inference is that if Plaintiff's 'illness' prevented her from finishing a course of musical studies, such 'illness' would also render her ineffective as a professional musician as of 1976, when the paper writing was mailed."

The transcript covers the years 1939, 40 and 41, some 35 years or more before the information was transmitted. Since the last year that appellant attended Peabody was 1941, this had to be the year that the alleged defamatory notation was made. At the time of the filing of the amended declaration the appellant had been a professional musician for forty years--since 1941, when she left the Peabody. In addition, appellant states that she continued working for the District of Columbia Public Schools for over 18 months after the alleged defamatory material was transmitted and received. The amended declaration then goes on to set out the appellee's duty to provide

correct and accurate information and not to publish false and defamatory information "concerning a private person in relation to a purely private matter." Further it asserts that the appellee breached its duty and that the breach was intentional and malicious. Also, the appellant claimed that in transmitting the information, the appellee acted in a reckless and negligent manner. Finally appellant averred that eighteen months after the transmittal she was forced to retire because of the prejudice created by the publication of the alleged defamatory phrase.

The Law

The Court of Appeals in Metromedia, Inc. v. Hillman, 285 Md. 161 (1979), held:

> "that in order for a declaration alleging libel in a Maryland court to withstand the test of a demurrer it must allege:
>
> (1) a false and defamatory communication
>
> a - which the maker knows is false and knows that it defames the other, or

b - that the maker has acted in reckless disregard of these matters, or
c - that the maker has acted negligently in failing to ascertain them, and

(2) that the statement was one which appears on its face to be defamatory, as, e.g., a statement that one is a thief, or the explicit extrinsic facts and innuendo which make the statement defamatory, and

(3) allegations of damages with some particularity, ..."

We hold that the declaration in this case cannot withstand the second criterion. The statement did not impute mental illness with sufficient specificity to appear defamatory on its face. E.g., Heath v. Hughes, 233 Md. 458, 464-65 (1964) ("zany" and "character" not defamatory); Brill v. Brenner, 62 Misc. 2d 102, 105, 308 N.Y.S. 2d 218, 222 (1970) ("berzerk" not defamatory); Alpar v. Weyerhaeuser Co., Inc., 20 N.C. App. 340, 342, 346, 201 S.E.2d 503, 505, 507 (1974) ("clinically paranoid" held defamatory). See generally, Annot., 23 A.L.R.3d 652

(1969). Inasmuch as the recipients of the transcript would not understand it as being defamatory, Koren v. Capital-Gazette Newspapers, Inc., 22 Md. App. 576, 585 (1974), the explicit extrinsic facts and innuendo that make it defamatory must be pled. This the declaration does not do. Consequently, the demurrer without leave to amend was properly sustained.

Because we have held that the statement is not defamatory, it is not necessary to reach the other issues raised by appellant.

JUDGMENT AFFIRMED

COSTS TO BE PAID BY APPELLANT.

APPENDIX D

ORDER DENYING PETITION FOR CERIORARI, DECEMBER 20, 1982

In the Court of Appeals of Maryland.

Petition Docket No. 450, September Term, 1982.

Lois Butler v. Peabody Institute of the City of Baltimore.

Before: Robert C. Murphy, C.J.

Filed: December 20, 1982.

Upon consideration of the petition for a writ of certiorari to the Court of Special Appeals and the answer filed thereto, in the above entitled case, it is

ORDERED, by the Court of Appeals of Maryland, that the petition be, and it is hereby, denied as there has been no showing that review by certiorari is desirable and in the public interest.

/s/ Robert C. Murphy

Chief Judge

DATE: December 20th, 1982.

APPENDIX E

SECOND AMENDED DECLARATION,

APRIL 27, 1981

In the Superior Court of Baltimore City.

Docket: 1977, Folio: 576, File: 11707.

Lois Butler v. Peabody Institute of the City of Baltimore.

Filed: April 27, 1981.

PLAINTIFF'S SECOND AMENDED DECLARATION FOR DAMAGES FOR LIBEL

Comes now Plaintiff Lois Butler (hereinafter "Plaintiff") through counsel and sues the Defendant Peabody Institute of the City of Baltimore (hereinafter called "Defendant" or "Peabody") for libel, to wit:

1. This Court has jurisdiction over this action because Defendant is based in Baltimore City.

2. On or about February 3, 1976, Defendant's agent and counsel, Robert Barnhouse, Esquire, prepared and mailed or caused to be

prepared and mailed a paper writing which went through the U.S. Mail from the offices of Piper & Marbury, 2000 First Maryland Building, 25 South Charles Street, Baltimore, Maryland 21201 to the Personnel Division, Washington D.C. Public Schools, Presidential Building, 12th Street and Pennsylvania Avenue, N.W., Washington, D.C. 20004. Employees of the District of Columbia Public Schools received and read the paper writing; therefore, the writing was published to third parties.

3. This paper writing, otherwise known as a transcript of Plaintiff's grades while she was a student at Peabody (1939-40-41), contained the false, misleading, and defamatory phrase "Dropped on account of illness." By this phrase Defendant intended to convey false and defamatory information to the D.C. Public Schools. The plain purport of the phrase "Dropped on account of illness" was that Plaintiff was dismissed or

discharged from Peabody Institute because she was ill.

4. Plaintiff was not discharged from Peabody Institute because she was ill; therefore, this purported reason for the discharge was false.

5. Other evidence in Plaintiff's possession indicates that Defendant meant the words, "Dropped on account of illness" to mean, in substantial effect, "Dropped on account of mental illness," and that on a previous occasion Defendant had so described and qualified the phrase.

6. The phrase "Dropped on account of illness" is defamatory, irrespective of whether physical or mental illness was inferred by the third parties who receive the paper writing, because Plaintiff is and has been for over forty years a professional musician, and the phrase in Defendant's paper writing meant that Defendant falsely certified that "illness" prevented Plaintiff from finishing her course of musical studies at Peabody. The plain inference is that if Plaintiff's

"illness" prevented her from finishing a course of musical studies, such "illness" would also render her ineffective as a professional musician as of 1976, when the paper writing was mailed.

7. Defendant had a duty to provide a correct and accurate transcript of Plaintiff's grades, including the reason for discharge, to third parties when so requested by Plaintiff, when Defendant accepted the transcript fee of $2.00 mailed by Plaintiff to Defendant on December 22, 1975.

8. Even if Defendant did not accept the $2.00 transcript fee, Defendant nevertheless had an affirmative duty not to publish a false and defamatory communication concerning a private person in relation to a purely private matter. Jacron Sales Co. v. Sindorf, 1976, 250 A.2d 688, 276 Md. 580.

9. Defendant breached its duty of providing a correct and accurate transcript of Plaintiff's

grades and of the reason why Defendant dropped Plaintiff.

10. Defendant's breach of duty was intentional and malicious, and was part of a long-standing policy of blackballing Plaintiff, because Defendant had ample information in its possession indicating that Plaintiff was not "Dropped on account of illness" in 1941.

11. In the alternative, Defendant's breach of duty was the result of Defendant's reckless disregard of pertinent matters or the result of negligence in failing to ascertain them.

12. Plaintiff was damaged by defendant's paper writing mailed on or about February 3, 1976, because shortly thereafter, in September 1977, Plaintiff was forced to retire from her position as a music teacher with the D.C. Public Schools. The defamatory phrase "Dropped on account of illness" contained in said paper writing or transcript mailed by Defendant to Plaintiff's employers, the District of Columbia Public

Schools, caused the said employers to view Plaintiff with prejudice at a time when music teachers were being laid off or retired, and Plaintiff was a victim of a reduction in force.

13. The amount of damages sustained by Plaintiff as a result of Defendant's act of intentional defamation is approximately $55,000; that is, the difference between her retirement pay since 1977 and the salary she would have earned had she remained a full-time teacher for the past four years.

14. It is estimated that her future out-of-pocket damages will amount to approximately another $55,000, attributable to Defendant's defamatory act.

15. Plaintiff's original declaration was filed on February 2, 1977, and the defamatory matter was published after February 3, 1976; therefore, this action is not barred by the one-year statute of limitations.

WHEREFORE, Plaintiff respectfully demands and claims the following relief:

1. Special damages already incurred in the amount of approximately $55,000.

2. Anticipated future special damages in the amount of approximately $55,000.

3. Punitive damages in the amount of $1,000,000, attributable to defendant's malicious and intentional act of defamation.

4. Plaintiff respectfully demands a jury trial.

POINTS AND AUTHORITIES FOR SECOND AMENDED DECLARATION

In the past few years the law of defamation in Maryland has undergone a gradual modernization. Historically, written defamation, or libel, was divided into "libel per se" and "libel per quod." "Libel per se" were written words which were defamatory on their face, such as a false imputation of crime. No special damages needed

to be alleged or proved to establish a cause of action for "libel per se." A false imputation of mental illness harming a person in the pursuit of his or her trade or profession was one of the recognized categories of "libel per se."

MLE, Libel, Article 16 states, "Words, whether written or oral which are injurious to a person in his profession, trade or business are actionable per se."

In the instant case it is clear that Defendant has sought, ever since 1947, to smear Plaintiff with false imputations of mental illness, so as to damage Plaintiff in her profession as a musician and music teacher. The paper writing of February 3, 1976, was but Defendant's latest effort in this respect.

The recent case of Jacron Sales Co. Inc. v. Sindorf (1976) 350 A.2d 688, 276 Md. 680 and General Motors v. Piskor, 277 Md. 165 (1976) have apparently altered Maryland law so as to require special damages to be alleged and proved

even in cases formerly actionable as libel per se. However, these recent cases have not changed the law with respect to the categories of words which are actionable. It is still the law as stated by MLE, Article 16, that "words, whether written or oral which are injurious to a person in his profession, trade or business are actionable per se."

Sindorf has grafted onto the law the further proposition that "one who publishes a false and defamatory communication concerning a private person in relation to a purely private matter is subject to liability if he knows that statement is false and that it defames the other, acts in reckless disregard of matters or acts negligently in failing to ascertain them."

In the instant case, Plaintiff is a private person, and the reason she was discharged from Peabody in 1941 is a private matter. Plaintiff alleges Defendant's statement is false, that Defendant knew the statement was false when it

was made. If Defendant did not know the statement was false, it acted in reckless disregard of matters or acted negligently in failing to ascertain them, because prior to the issuance of the paper writing of February 3, 1976, Plaintiff had engaged in prolonged correspondence with Defendant over a period of three decades, attempting to have the false statement purged from her records. Moreover, in 1975, Plaintiff's counsel submitted a comprehensive legal brief to Defendant demonstrating why the phrase "Dropped on account of illness" was false.

Therefore, Plaintiff's action fits into one of the recognized categories of actions for defamation, in that Plaintiff alleges that the words were injurious to her profession and furthermore, Plaintiff has alleged special damages attributable to the defamatory words. Also, since Plaintiff is a private person and this is a private matter, Sindorf and related cases hold Defendant to a high standard of care, so that recklessness or

negligence on the part of Defendant can furnish a basis for the action.

Excerpt from Plaintiff's Response to Demurrer, filed May 28, 1981

"Mr. Kenneth G. Kelley, Dean
Boston University
College of Music
25 Blagden St.
Boston 16, Mass.

Dear Mr. Kelley:

I have your letter of May 23 and I will do my best to be fair to all parties concerned. Miss Lois Butler has a great deal of talent and ability. Unfortunately, however, she is extremely nervous and loses control of herself to such an extent that she herself has sought medical advice. During her period of study with us it seemed impossible for her to concentrate on the work at hand, which she was capable of doing and doing well. She was continually asking for changes in her course and seemed to be so convinced that her difficulties were because of outside interference rather than within herself that we finally felt we could not permit her to reenroll. We tried in every way to help her but were advised by the doctors to whom she went that the nature of her illness would prevent her from giving her full attention to the courses she wished to undertake.

Miss Butler is capable of holding professional positions, and has done this during her residence in Baltimore, and it is a great misfortune that she could not control herself. It may be that in a new environment her condition will improve, and I must repeat that she has both talent and ability.

I want very much to be fair to Miss Butler, but on the other hand, I must be honest with you.

Sincerely yours,

(Sgd.) Virginia Carty, Dean"

This letter clearly indicates that the "illness" referred to in the phrase "dropped on account of illness" is mental illness. Copies of this letter have been furnished to Defendant. It is respectfully requested that the above quotation be incorporated by reference into the Second Amended Declaration.

APPENDIX F

APPELLANT'S MOTION FOR COPY OF ORAL ARGUMENT

In the Court of Special Appeals of Maryland.

Lois Butler v. Peabody Institute of the City of Baltimore.

No. 792, September Term, 1979.

Filed: March 21, 1980.

Comes now Appellant Lois Butler through counsel and respectfully moves the Court to provide Appellant with a true copy of the transcript of the oral argument of February 11, 1980.

This transcript is needed by Appellant because, in the course of the argument, Appellee counsel admitted, in response to a question from the bench, that the reason why Appellee failed to respond to Appellant's declaration was that Appellee's insurance company withheld the transcript from Appellee counsel for a period of eight months. This admission undermines Appellee's

argument that "confusion" caused Appellee's protracted delay in responding to the declaration.

Because Appellee's defense, both in the trial court and in this Court, is based on the theory of "confusion," Appellant needs a true copy of the transcript in order to overcome this defense. The transcript may be needed for proceedings in other courts as well as for future proceedings in this Court.

WHEREFORE, Appellant respectfully moves the Court to make said transcript available upon payment of the usual fees.

/s/ John Z. Noyes
Suite 9
1000 Connecticut Ave. NW
Washington, D.C. 20036
452-1199
COUNSEL FOR
APPELLANT

/s/ Beverly G. Stone
15 Maplewood Court
Greenbelt,
Maryland 20770
474-8049
COUNSEL FOR
APPELLANT

APPENDIX G

CLERK'S LETTER TO COUNSEL ADVISING APPELLANT OF COURT'S DENIAL OF TRANSCRIPT OF ORAL ARGUMENT

Denial of Motion.

In the Court of Special Appeals of Maryland.

Lois Butler v. Peabody Institute of the City of Baltimore.

Filed: March 24, 1980.

John Z. Noyes, Esquire
Suite 9
1000 Connecticut Avenue, N.W.
Washington, D.C. 20036

Beverly G. Stone, Esquire
15 Maplewood Court
Greenbelt, Maryland 20770

Re: Lois Butler v. Peabody Institute of the City of Baltimore et al.

No. 792, September Term, 1979

Dear Counsel:

The Motion for True Copy of Transcript of Oral Argument was presented, considered, and denied by the Court this date.

Very truly yours,

/s/ Howard E. Friedman

HEF/nze

cc: R. Roger Drechsler, Esquire

APPENDIX H

MARYLAND RULE 1092,

NON-CITATION OF UNREPORTED OPINIONS

Rule 1092. Opinions--Duty of Clerk--Non-Citation of Unreported Opinions.

a. In Writing--Time for Filing.

In every case this Court shall render a concise opinion which shall be reduced to writing and filed with the Clerk within sixty days of the argument.

b. Publication.

The Clerk shall deliver to the printer for inclusion in the official reports such opinions as are designated by the Court as proper for publication. An opinion which is not of substantial general interest as a precedent shall be per curiam and shall not be published.

c. Non-Citation of Unreported Opinions.

An unreported opinion of this Court is not a precedent within the rule of stare decisis, and shall not be cited by a court or party for any

purpose, in any unrelated action or proceeding, but may be used where relevant under the doctrine of the law of the case, res judicata or collateral estoppel, or in a criminal action or proceeding involving the same defendant or a disciplinary action or proceeding involving the same respondent.

(Added Mar. 12, 1976, effective Apr. 1, 1976.)

Source: Annotated Code of Md., vol. 9B.

No. 82-1546

Office-Supreme Court, U.S.
FILED
APR 12 1983
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

LOIS BUTLER,

Petitioner,

v.

PEABODY INSTITUTE OF THE CITY OF BALTIMORE,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF MARYLAND

BRIEF FOR PEABODY INSTITUTE OF THE CITY OF BALTIMORE IN OPPOSITION

FREDERICK J. GREEN, JR.,
7th Floor,
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(301) 539-5881,
Attorney for Respondent,
Peabody Institute of the
City of Baltimore.

The Daily Record Co., Baltimore, MD 21202

TABLE OF CONTENTS

	PAGE
ARGUMENT	2
I. Petitioner was not denied her Seventh Amendment right to jury trial	2
A. The Seventh Amendment is inapplicable to state civil court proceedings	2
B. The Seventh Amendment does not require a trial by jury on issues of law	3
II. Petitioner was not denied rights guaranteed under the Fifth and Fourteenth Amendments	5
CONCLUSION	7

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Bringe v. Collins, 274 Md. 338, 335 A.2d 670 (1975)	2
Carter v. City of New Orleans, 327 So. 2d 488 (La. App. 1976)	2
Edwards v. Elliott, 241 U.S. 211 (1916)	2
Griffin v. Illinois, 351 U.S. 12 (1956)	5
Iacaponi v. New Amsterdam Cas. Co., 258 F. Supp. 880 (W.D. Pa. 1966), *aff'd.,* 379 F.2d 311 (3rd Cir. 1967), *cert. denied,* 389 U.S. 1054 (1968)	2

PAGE

Irwin v. Globe-Democrat Pub. Co., 368 S.W.2d 452 (Mo. 1963) 2

Minneapolis & St. L.R. Co. v. Bombolis, 241 U.S. 211 (1916) 2

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United States Constitution:

Fifth Amendment 1, 5, 6

Fourteenth Amendment 1, 2, 5, 6

Seventh Amendment 1, 2, 3, 4, 5

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Md. Cts. & Jud. Proc. Code Ann.:

§ 12-307 6

§ 12-308 6

No. 82-1546

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

LOIS BUTLER,

Petitioner,

v.

PEABODY INSTITUTE OF THE CITY OF BALTIMORE,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF MARYLAND

BRIEF FOR PEABODY INSTITUTE OF THE CITY OF BALTIMORE IN OPPOSITION

The Petitioner, Lois Butler, contends that the state court violated her Seventh Amendment right to jury trial in ruling that her complaint failed to state a cause of action. Petitioner further contends that the Court of Special Appeals of Maryland violated her Fifth Amendment and Fourteenth Amendment rights to due process in denying her request for a transcript of oral argument in the appeal of a civil action. These issues will be addressed *seriatum*.

ARGUMENT

I.

PETITIONER WAS NOT DENIED HER SEVENTH AMENDMENT RIGHT TO JURY TRIAL.

A. The Seventh Amendment Is Inapplicable To State Civil Court Proceedings.

The Seventh Amendment provides:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rule of the common law.

This Court has consistently held that a litigant in a state court civil action has no right to trial by jury under this Amendment or under the due process clause of the Fourteenth Amendment. *Minneapolis & St. L. R. Co. v. Bombolis*, 241 U.S. 211, 219-20 (1916); *Walker v. Sauvinet*, 92 U.S. 90, 92-93 (1876); *Edwards v. Elliott*, 21 Wall. (88 U.S.) 532, 557 (1874). *Accord, Woods v. Holy Cross Hospital*, 591 F.2d 1164, 1171 (5th Cir. 1979); *Wartman v. Branch 7, Civil Division County Court, Milwaukee County, State of Wis.*, 510 F.2d 130, 134 (7th Cir. 1975); *Iacaponi v. New Amsterdam Cas. Co.*, 258 F. Supp. 880, 884 (D.C. Pa. 1966), *aff'd*, 379 F.2d 311 (3rd Cir. 1967), *cert. denied*, 389 U.S. 1054 (1968); *Carter v. City of New Orleans*, 327 So. 2d 488 (La. App. 1976); *Bringe v. Collins*, 274 Md. 338, 335 A.2d 670 (1975); *Irwin v. Globe-Democrat Pub. Co.*, 368 S.W.2d 452 (Mo. 1963); *Wooten v. Dallas Hunting & Fishing Club, Inc.*, 427 S.W.2d 344 (Tex. Civ. App. 1968). In *Walker v. Sauvinet*, 92 U.S. 90, 92-93 (1876), this Court stated:

> By art. 7 of the amendments, it is provided, that "in suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury

> shall be preserved." This, as has been many times decided, relates only to trials in the courts of the United States. *Edwards v. Elliott,* 21 Wall. 557. The States, so far as this amendment is concerned, are left to regulate trials in their own courts in their own way. A trial by jury in suits at common law pending in the State courts is not, therefore, a privilege or immunity of national citizenship, which the States are forbidden by the Fourteenth Amendment to abridge. A State cannot deprive a person of his property without due process of law; but this does not necessarily imply that all trials in the State courts affecting the property of persons must be by jury.

Thus, the Seventh Amendment right to jury trial does not apply to state court civil proceedings such as the instant case.

B. The Seventh Amendment Does Not Require Trial By Jury On Issues Of Law.

Even if the Seventh Amendment applied to state court proceedings, it would not mandate a jury trial of the issue decided by the state court here. Petitioner contends that the Court of Special Appeals denied her right to jury trial in ruling that her complaint failed to state a cause of action. *See Petition for a Writ of Certiorari,* at page i. Specifically, the trial court sustained a demurrer challenging the legal sufficiency of petitioner's second amended declaration. The Court of Special Appeals of Maryland affirmed that jugdment holding that the declaration failed to allege sufficient facts to state a cause of action for defamation. *See Petition for Writ of Certiorari, Appendix C,* at pages 14-16. The petitioner thereupon filed a petition for writ of certiorari in the Court of Appeals of Maryland, which was denied. *See Petition for Writ of Certiorari, Appendix D,* at page 17.

In *Baltimore & Carolina Line, Inc. v. Redman,* 295 U.S. 654, 656-57 (1935), this Court stated:

The Seventh Amendment to the Constitution prescribes:

> "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of the common law."
>
> The right of trial by jury thus preserved is the right which existed under the English common law when the amendment was adopted. The Amendment not only preserves that right but discloses a studied purpose to protect it from indirect impairment through possible enlargements of the power of re-examination existing under the common law, and to that end declares that "no fact tried by a jury shall be otherwise re-examined in any court of the United States than according to the rules of the common law."
>
> The aim of the Amendment, as this Court has held, is to preserve the substance of the common-law right of trial by jury, as distinguished from mere matters of form or procedure, and particularly to retain the common-law distinction between the province of the court and that of the jury, whereby, in the absence of express or implied consent to the contrary, *issues of law are to be resolved by the court* and issues of fact are to be determined by the jury under appropriate instructions by the court. [footnotes deleted, emphasis added].

In light of this authority, the court in *Allen v. Biggs*, 62 F. Supp. 229 (E.D. Pa. 1945), specifically held that the dismissal of a complaint for the reason that it failed to state a cause of action did not violate the plaintiff's Seventh Amendment right to jury trial. *See also Bass v. Hoagland*, 172 F.2d 205, 209 (5th Cir. 1949), *cert. denied*, 388 U.S. 816 (1949); *Monroe Auto Equip. Co. v. Heckthorn Mfg. & Supply Co.*, 214 F. Supp. 704, 706 (W.D. Tenn.,

W.D. 1963), *aff'd.* 332 F.2d 406 (6th Cir. 1964), *cert. denied,* 379 U.S. 888 (1964). Under these principles, the issue of whether the petitioner's declaration here states a cause of action is purely one of law and thus within the province of the court, not the jury. Therefore, even if the Seventh Amendment right to jury trial were held to apply to state proceedings, the Maryland court did not violate that right in deciding that petitioner's declaration failed to state a cause of action.

It is therefore respectfully submitted that petitioner has failed to properly raise a federal question under the Seventh Amendment.

II.

PETITIONER WAS NOT DENIED RIGHTS GUARANTEED UNDER THE FIFTH AND FOURTEENTH AMENDMENTS.

Petitioner also contends that the state court violated her Fifth and Fourteenth Amendment right to due process in denying her request for a transcript of oral argument before the Court of Special Appeals of Maryland. The due process clause has never been construed to mandate a transcript of oral argument at the appellate level in a civil action. Rather, that clause has been construed to require only that where a State provides for appellate review, litigants who cannot afford to buy transcripts must be granted the same appellate review as litigants who can. *E.g., Griffin v. Illinois,* 351 U.S. 12 (1956). Here, the Maryland appellate courts deny all litigants transcripts of oral argument. In this regard, therefore, the petitioner has been afforded the same appellate review as all other litigants. Accordingly, there has been no violation of her rights under the due process clause. Further, since no evidence may be presented in Maryland appellate courts, the absence of transcripts cannot affect the fundamental rights of the parties. Finally, although there is no provision for the transcription of oral argument before the

Maryland appellate court, that court is open to the public and there is no restriction on the stenographic transcription of argument by a privately retained court stenographer. Petitioner, therefore cannot assert that the state court has somehow denied her a fundamental constitutional right.

Even if the due process clause mandates a transcript of oral argument in a civil action, it is apparent that the denial of such a transcript did not prejudice the petitioner here. Petitioner asserts that during the course of oral argument before the Court of Special Appeals of Maryland counsel for respondent made a significant admission in open court. Petitioner further avers that in denying her request for a transcript of that argument, the Court of Appeals jeopardized her opportunity to argue the effect of that alleged admission before the Maryland Court of Appeals. *See Petition for a Writ of Certiorari,* at pages i and 13.[1] Petitioner, however, enjoyed the full benefit of any such admission because it was made by counsel in open court and was relevant to the issue then before the court.

Accordingly, petitioner has failed to properly raise a federal issue under the Fifth or Fourteenth Amendments.

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[1] The Maryland appellate court system consists of two courts: The Court of Special Appeals and The Court of Appeals. The former is an intermediate appellate court and has jurisdiction of cases appealed from trial courts. The latter is the highest Maryland court. The Court of Appeals may, pursuant to a grant of certiorari, hear cases previously heard by the Court of Special Appeals. *See* MD. CTS. & JUD. PROC. CODE ANN. §§ 12-307 & 12-308.

CONCLUSION

For the reasons stated, it is respectfully submitted that petitioner has failed to properly present a federal question and has failed to demonstrate special and important reasons for the issuance of a writ of certiorari by this Court.

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